Supreme Court, U.S.
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No. 02-1292

Supreme Court of the United States
October Term, 2002

NEMESIS VERITAS, L.P. f/k/a MCMAHAN & COMPANY
and D. BRUCE MCMAHAN,

Petitioners,

-against-

WILLIAM A. TOTO,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF DEMONSTRATES WHY THE WRIT SHOULD BE GRANTED

A. The Eleventh Circuit's Improper Determination Undermines A 60 Year Old Rule Concerning The Choice-Of-Law Analysis Required In Diversity Actions

Respondent admits that Fla. Stat. §768.79 is a state substantive law and that the issue facing the Eleventh Circuit in this diversity action was whether the substantive law of Virginia or Florida applied (Resp. Brief p. 4). It also is undisputed that, to determine which state's law to apply, the Eleventh Circuit was required to apply the forum state's choice of law rules. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S. Ct. 167, 46 L.Ed2 3 (1975). *See* Resp. Brief p. 4. Respondent does not and cannot deny that Virginia law, and not Florida's §768.79, would apply in this case had the Eleventh Circuit applied Florida's choice of law rules in ascertaining which law to apply.

Respondent is wrong in asserting (Ibid.) that a federal court is not required to follow a choice-of-law analysis when the state court failed to do so. The case cited for this proposition, *Day & Zimmerman, supra,* states exactly the opposite (423 U.S. at 4-5, 96 Ct. at 168): "[T]he conflict-of-laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts.***The Court of Appeals in this case should identify and follow the Texas conflicts rule. What substantive law will govern when Texas' rule is applied is a matter to be determined by the Court of Appeals." Thus, the holding in *BDO Seidman v. British Car Auctions,* 802 So.2d 366, 368 (Fla. 4th DCA 2001), that Fla. Stat. §768.79 "should be applied without engaging in a conflict

of laws analysis" because, according to the statute, it "applies to 'any civil action for damages filed in the courts of this state'" is irrelevant in a federal diversity action since the issue in the first instance is whether §768.79 applies at all.

Finally, it cannot be asserted that *BDO Seidman* interpreted Florida's choice-of-law rules. BDO specifically refused to engage in any choice-of-law analysis.

Therefore, there is an urgent need for this Court to correct the Eleventh Circuit's misapprehension of the law so as to prevent the undermining of a 60 year old rule concerning the choice-of-law analysis required in diversity cases.

B. The Eleventh Circuit's Determination Conflicts With A Determination Made By The Tenth Circuit

The Petition noted that the Eleventh Circuit's failure to employ a choice-of-law analysis in considering whether to apply a state attorney fee statute in a diversity case conflicts with a determination of the Tenth Circuit and that this is a substantial reason for granting certiorari. In *Boyd Rosene and Associates v. Kansas Municipal Gas Agency,* 123 F.3d 1351 (10th Cir. 1997)(En banc), the Tenth Circuit directed the lower court to first apply the forum state's choice-of-law rules in determining which state's law to apply in respect of the award of attorney's fees.

Respondent is wrong in contending that (Resp. Brief p. 4) "the Tenth Circuit followed the analysis mandated by the forum state of Oklahoma" and that, therefore, no conflict exists. In *Boyd,* the Tenth Circuit cited only federal case law in requiring a choice-of-law analysis (123 F.3d at 1352-3):

> First, in this circuit, the matter of attorney's fees in a diversity suit is substantive and is controlled by state law. See Public Serv. Co. of Colorado v. Continental Cas. Co., 26 F.3d 1508, 1520 (10th Cir. 1994); Missouri Pacific RR. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 801 (10th Cir. 1988). Second, a federal court sitting in diversity must apply the substantive law of the state in which it sits, including the forum state's choice-of-law rules. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495-97, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941); Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994). ***[R]ather than automatically applying the law of the state providing the substantive contract law, a district court must first apply the forum state's choice-of-law rules in resolving attorney's fees issues.[1]

Importantly, respondent does not dispute the fact that the forum state attorney fee statutes of Florida and Oklahoma both require the assessment of attorney's fees "In any civil

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[1] The Tenth Circuit subsequently affirmed the lower court's determination on remand that Oklahoma's attorney fee statute was a substantive, not procedural, law for choice-of-law purposes and that under Oklahoma choice-of-law principles, Kansas law which governed the parties' agreement controlled. *Boyd Rosene and Associates v. Kansas Municipal Gas Agency,* 174 F.3d 1115 (10th Cir. 1999). The Tenth Circuit's analysis is similar to the Eleventh Circuit's original decision in *McMahan v. Toto,* 256 F.3d 1120 (11th Cir. 2001), *amended* 311 F.3d 1077 (11th Cir. 2002).

action". However, the Tenth Circuit determined that the statutory wording did not permit the ignoring of federal law mandating a choice-of-law analysis as *McMahan* implicitly held by relying on *BDO Seidman.* Accordingly, there is a conflict between the Tenth and Eleventh Circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated May 14, 2003

Respectfully submitted,

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